No. 12104

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEN C. KOEPKE, Individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter,

Appellant,

vs.

J. FONTECCHIO,

Appellee.

BRIEF OF APPELLEE.

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Statement of the Case.

On October 1, 1947, appellee commenced operating as a motor court certain of the buildings located on the lot described in his affidavit [R. 33, *et seq.*] the whole of which is commonly known as 8008-8014⅞ South Vermont Avenue, Los Angeles, California.

The buildings so used were the unit used by the manager as an office and residence, the eight units in two buildings which had been converted from four units, the building on the rear of the lot known as 8012⅞ South Vermont Avenue, to which no structural alterations had been made, the garages, and the parking area.

The complete occupancy record summarized in Fontecchio's affidavit shows clearly the predominantly transient nature of his rentals, typical of motor court operation. [R. 44.] The same affidavit shows that parking and storage space for automobiles, and other services customarily supplied by motor courts were furnished by Fontecchio to his guests.

It is apparent from the affidavit that the premises were being used in such a manner as to qualify them as tourist court or motor court under the provisions of the Los Angeles City Ordinance defining such operation [R. 39] and of the Housing Expediter's own regulations defining a motor court (Appendix p. 14) with the exception of the requirement which gives rise to this litigation, namely that a motor court must have been such on June 30, 1947.

In spite of the fact that four representatives of the Housing Expeditor's office had inspected the premises, and that three of them had interviewed appellee's neighbors, and that one of them had inspected appellee's records [R. 22-24] no affidavits were filed controverting in any respect the facts related in Fontecchio's affidavit concerning the operation and physical appearance of the premises, the construction work which had been done, or the use made of the premises.

Appellee's motion for summary judgment was granted by the District Court and this appeal followed.

ARGUMENT.

I.

The Statute Does Not Require That a Motor Court Have Been Such on June 30, 1947, in Order to Be Free From Control.

The Housing and Rent Act of 1947 (50 U. S. C. A., Sec. 1881, *et seq.*) simply excludes from its operation ". . . any motor court, or any part thereof; . . ." (Sec. 202(c)(2).) Contrary to the impression produced by Appellant's Brief (p. 19) there is no language referring to any specific date.

In 1948 this language was repealed and re-enacted with the addition of a reference to trailers and trailer space, and if the 1947 Act be considered to speak only of a period immediately preceding its enactment, then, by the same principle the 1948 Act should speak as of March 31, 1948, at which time appellee's establishment was in full operation as a motor court.

When Congress wanted to fix a status-determining date it knew how to do so as shown by the 1949 legislation, defining a "hotel" for certain purposes as ". . . any establishment which on June 30, 1947 . . ." met certain defined standards. (Housing and Rent Act of 1949, Sec. 202(c)(1)(B); Appendix p. 13.) Significantly, the language relating to motor courts was unchanged by this act.

II.

The Legislative History of the Motor Court Exclusion Does Not Justify the Housing Expediter's Efforts to Provide an Administrative Amendment to the Act.

There was no discussion either in committee or on the floor during the passage of the Housing and Rent Act of 1947 of any status-determining date for motor courts.

After the passage of the Act the Housing Expediter by "interpretation" took the position that a motor court must have been such on June 30, 1947, to be decontrolled. This construction of the statute was vigorously resisted by appellee as soon as it was sought to be applied to him.

Had the Housing Expediter been sure of his ground the normal action would have been (1) to incorporate the provision into his regulations, and (2) if challenged, present the matter to the next Congress and secure express legislative approval of his stand.

Instead, nothing was said relating to this matter in the 1948 Committee Hearings to which appellant so grandiosely refers (Brief p. 23, and note) as an "exhaustive review" of the Expediter's administration; after the 1948 legislation became effective the Expediter put the provision in his regulations and managed to have it referred to in a rump session between certain selected members of Congress and of the Housing Expediter's staff, and even here the reference simply is to practices which would clearly be an evasion of the statute under any circumstances.

Such caution on a matter claimed to be so important demonstrates, we believe, that the Housing Expediter really felt that if the matter had been presented to Congress his "interpretation" would have been rejected. And

the passage of the 1949 legislation, inserting a status-determining date as to certain hotels, but leaving the motor court provisions untouched was such a rejection.

Appellant's suggestion (Brief pp. 23-24) that the language quoted from the Senate and House Committee reports of 1948 constitutes an approval of the Housing Expediter's interpretation is disingenuous.

Up to the time the Committees wrote, the June 30, 1947 requirement was a matter of interpretation only; the Committee language refers to what the Expediter had previously done by *regulation*. The Committee comment actually refers to the Housing Expediter's decontrol of trailers and trailer space *by regulation* on January 5, 1948. (12 F. R. 8660.)

Appellant's reliance upon an *ex post facto* discussion between certain members of Congress and select members of the Housing Expediter's staff as a guide to the intention of the *whole* Congress in extending the 1947 Act is nothing short of extraordinary. Should the principle contended for be sanctioned by this Court a Congressional minority could always become the majority by holding "interpretative" sessions after the passage of legislation.

Appellant's argument for June 30, 1947 as a status-determining date, based upon the Congressional provision fixing maximum rents as those established under the Emergency Price Control Act of 1942, in effect overlooks two significant elements in the problem before this Court. *First,* the provision relates only to "controlled" housing accommodations, and to that extent appellant begs the question. *Second,* the buildings here involved were not subject to the Emergency Price Control Act of 1942, as amended, or to its subsidiary regulations, on June 30,

1947, since on that date they were neither rented nor offered for rent. [R. 35-40.] *Emergency Price Control Act of* 1942, Sec. 302(f). (Appendix p. 13.)

III.

To Hold That Appellee's Establishment Was Not Subject to Control Will Neither Open the Door to Evasion nor Thwart the Congressional Purpose.

Appellee's basic proposition is that since the Congress has decontrolled housing accommodations when *used* as hotels, motor courts, or the like, a person owning accommodations which may be practicably operated as such, with or without structural change, may, if it does not affect the rights of existing tenants, devote such accommodations to a decontrolled operation rather than a controlled operation.

It was certainly never the Congressional intention to say that because in 1805 a structure had been built as a private dwelling house, it must either be not used at all or used only in accordance with the plans of its original designer, and yet to sustain appellant's position in this case would require the Court to reach this ultimate absurdity.

The Housing Expediter has never contended that a person may not permit housing accommodations to become vacant, remain vacant, and, when the building is empty, devote it entirely to a business use, such as offices. In principle there can be no objection to turning the same vacant building into a hotel or motor court. Indeed, the case at bar is stronger than that supposed since, as has been noted, the accommodations here involved had been withdrawn from the housing market prior to the passage of the 1947 Act.

Appellant's argument that Congress did not intend to foster the creation of transient accommodations is un-

tenable in view of the fact that Congress placed no restriction upon the end-use of accommodations built after February 1, 1947. To hold that the builder of a new motor court on October 1, 1947 was decontrolled but to deny to the owner of vacant property the right to commence a motor court operation after June 30, 1947, would be to ascribe to Congress an intent to create a limited monopoly in the motor court business and would be, it seems, to sanction an unconstitutional discrimination against the class to which appellee belongs.

IV.

The Suit Is Not One Against the United States. The Housing Expediter Is Not a Necessary or Indispensable Party.

Where the claim stated involves the assertion that the defendant, though an official of the United States, is acting *ultra vires* the statute, or under an unconstitutional statute, the suit is not one against the United States.

Mine Safety Appliances Company v. Forrestal, 326 U. S. 371;

Land v. Dollar, 330 U. S. 731, 738;

Oklahoma v. Guy F. Atkinson Co. et al., 39 Fed. Supp. 93 (3 judge court).

If appellee were correct in claiming this to be a suit against the United States, that would be equally true of a suit against Tighe E. Woods, the Housing Expediter himself, and the result would be that there could be no judicial review of action by the Housing Expediter's Office since the immunity of the United States from suit can only be waived by Congress, not by the Executive Branch of the government.

Anderegg v. United States, 171 F. 2d 127.

The Housing Expediter is not an indispensable party to a suit such as this. The best analysis of the cases cited by appellee is to be found in *Neher v. Harwood,* 128 F. 2d 846, where this Court distinguishes between (1) situations in which the officials were acting within the area of discretion given them by a valid statute, in which cases joinder of the superior officer was indispensable so that he could take new independent action or correct erroneous action of his subordinates, and (2) situations in which the action taken was unauthorized either because beyond the authority given by statute or because the statute itself was unconstitutional.

In the case at bar the action taken is *ultra vires* the statute and the superior is not indispensable. In this the case is like *Colorado v. Toll,* 268 U. S. 228 where the superior's regulation, *ultra vires* the statute, was interfering with contractual rights. *Williams v. Fanning,* 68 S. Ct. 188, broadens the second class since the petitioner's claim there was ". . . that they had been deprived of the hearing to which they were entitled and that the fraud order was without the support of substantial evidence . . . ." While the first branch of the claim may raise constitutional questions it is clear that the second does not, and is a matter which would seem to be within the area of statutory discretion.

In any event appellees' claim that judgment against him in this action would "interfere with the public administration" is absurd. Such a judgment will necessarily be based on a decision that he is acting beyond his statutory authority and beyond that of his superior. Such administration is public only in the sense that it is not concealed.

V.

Where the Controversy Between the Citizen and the Agency Is as to a Matter of Statutory Construction and Where the Agency Has Not Purported to Require a Resort to It for Determination of Such Questions an Action for Declaratory Relief Is Permissible.

Section 202(c) of the Housing and Rent Act of 1947 excludes certain categories of housing accommodations from control by definition. Accommodations not so excluded are called "controlled housing accommodations." Section 204(b) of the Act making certain conduct unlawful relates only to controlled housing accommodations. Without more the statute is self-executing.

That it was intended by the Congress to be self-executing was demonstrated in the debate on the Senate floor.

During a discussion of possible maladministration of the provisions of the pending legislation it was pointed out that local boards were being given authority to decide upon general decontrol. At this point Senator Fulbright said:

> ". . . Well they [the Local Boards] are the ones who will make the decision whether certain areas should be decontrolled. Besides, certain categories of housing, such as hotels, tourist courts, and so forth, are not covered." (*Congressional Record*, Vol. 93, p. 6281, June 2, 1947.)

And the Housing Expediter's authority to issue regulations was given in these limited terms:

> "The Housing Expediter is authorized to issue such regulations and orders, *consistent with the provisions of this title,* as he may deem necessary to carry

> out the provisions of this section and section 202(c)." (Emphasis supplied.) (*Housing and Rent Act of 1947,* Section 204(d).)

Hundreds of lawsuits have been brought and tried since July 1, 1947, in which status of accommodations under the Act is the major issue. Some are eviction cases in which statutory grounds for eviction need not be shown if the accommodations are decontrolled. Others are eviction cases in which the issue is, was the rent demanded but unpaid legal because of decontrol. Actions have been brought by landlords against their tenants to secure a declaration of decontrol and tenants have sought an opposite result.

In all such cases, appellee concedes that the Court entertaining the suit has jurisdiction to determine whether or not the housing accommodations are, or are not, subject to the Act.

The nature of the primary jurisdiction rule is such that, where it is applicable, no Court, anywhere, in any connection, can make the determination, or review it, unless the question has first been submitted to and decided by the administrative agency.

Accordingly, unless our construction of the statute is correct, the General Counsel, Office of the Housing Expediter was wrong when, purporting to construe the statute he said:

> "Where, however, the local courts have ruled that this type of occupancy [where a purchaser, as part of a purchase contract, permits the seller to remain in

possession for a short period of time] does not involve a landlord-tenant relationship, and the parties acted in reliance upon the decision of the court, the question of decontrol of the particular housing accommodations is left for decision by the local courts." [13 F. R. 5001, Part VI, Sub-part 7.]

There was and is an actual controversy between appellant and appellee occasioned by a difference as to the proper construction of the Act and this construction was not only persistently maintained by the agency prior to the institution of this suit, but, after its institution and on April 1, 1948, the Housing Expediter himself, with knowledge of this suit [R. 31-32] attempted to do, by regulation (13 F. R. 1861) what he had theretofore attempted to do by interpretation.

To secure a declaration of decontrol, plaintiff has not been required by regulation to seek an administrative remedy. On August 2, 1947, Amendment 2 to the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments was amended so as to make "optional" a report of decontrol for motor courts.

On April 1, 1948, even the provision for an optional report was done away with so far as motor courts were concerned. (Rent Regulation for Controlled Rooms, etc., Amendment 27, 13 F. R. 1861.)

It is common knowledge that even with respect to hotels, for which a report is required the Housing Expediter's office merely acknowledges the receipt of the

report, noting on it that the office does not pass upon eligibility for decontrol.

Under these circumstances we do not see how it can be contended that there was any administrative remedy available. The provisions of the Rent Procedural Regulation referred to in Appellant's Brief (pp. 14-16; Appendix, pp. 51-59) are simply not applicable to questions of decontrol.

The case here is substantially identical to *Skinner & Eddy Corp. v. U. S.*, 249 U. S. 557, in which the Interstate Commerce Commission had issued a rate order which the corporation thought lacked statutory authority. In disposing of the contention that the corporation should have sought administrative review the Court said (p. 562):

> ". . . But plaintiff does not contend that seventy-five cents is an unreasonably high rate, or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction to enjoin the enforcement of an order even if the plaintiff has not attempted to secure redress in a proceeding before the Commission." *Cf.:*
>
> *Varney v. Warehime,* 146 F. 2d 238, at p. 244, col. 1;
>
> *Columbia Broadcasting System v. U. S.,* 316 U. S. 407.

VI.

The Motion for Summary Judgment Was Properly Granted.

The purpose of Rule 56, F. R. C. P., providing for Summary Judgment is to dispose of cases where there is no genuine issue of fact, even though an issue may be raised formally by the pleadings.

Miller v. Miller, 122 F. 2d 209;

Fletcher v. Krise, 120 F. 2d 809 (cert. den.) 314 U. S. 608, 62 S. Ct. 88.

It rests upon the party opposing summary judgment at least to specify some opposing evidence which it can adduce and which would change the result of the evidence, including admissions, adduced by the moving party.

Radio City Music Hall Corp'n. v. U. S., 135 F. 2d 715.

Appellant claims (Brief pp. 10-12) that there were material issues of fact, namely: (1) whether or not the premises were being operated as a motor court; (2) which of the buildings on the whole lot owned by appellee were being used in the motor court business; and (3) whether or not appellant threatened to and would, unless restrained, direct the commencement of and commence an action against appellee to restrain him from collecting rents in excess of appellant's order.

The so-called issues (1) and (2) above were raised only by appellant's answer denying the factual allegations of the complaint for "lack of information or belief." [R. 14, par. III and IV.] The full facts concerning the operation and physical appearance of the premises, the construction work which had been done, and the use made

of portions of the lot which were not used in the motor court business were set forth in detail in the affidavit of J. Fontecchio [R. 33-54] and the judgment carefully defined the portions of the lot and structures which were and were not part of the motor court. [R. 26-28.] None of the evidentiary facts in this affidavit were denied, although it appeared from the supplemental affidavit of J. Fontecchio [R. 22-23] that four representatives of the Housing Expediter's office had visited and inspected the premises, and that three of them had interviewed appellee's neighbors, and from the supplemental affidavit of Austin Clapp [R. 24] that an employee of the Housing Expediter's office had examined appellee's rental records. It certainly seems that these investigations would have provided a basis for counter-affidavits on the part of appellant if any of the facts were questioned.

The so-called issue (3) above is one of semantics. Appellee admitted that unless restrained he intended to issue an order fixing maximum rents for the premises and alleged in his affidavit [R. 21] that he had no authority to commence or direct the commencement of an action, but that he did have authority to receive and investigate complaints and refer them to the Litigation Unit of the Office of the Housing Expediter for their consideration and action. The supplemental affidavit of Austin Clapp pointed out that the attorneys representing appellant in the trial court were members of the Litigation Unit of the Office of the Housing Expediter and that any complaints received by appellant would be referred by him to these same attorneys. This was not denied.

The chain of causation from the issuance of an order by appellant to the commencement of an action to enforce it, by way of appellant's receipt of a complaint and its referral to the Litigation Unit, was apparent. It was equally apparent that if a complaint were to be referred by appellant to the attorney who were vigorously asserting that the premises were not a motor court, they could hardly reverse their position and refuse to commence an action based upon the complaint. The injunctive provisions of the judgment were clearly within the area of the trial court's discretion.

Respectfully submitted,

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By AUSTIN CLAPP,
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APPENDIX.

HOUSING AND RENT ACT OF 1947 (Pub. L. 129, 80th Cong., Ch. 163, 1st Sess.).

Section 202(c).

"The term 'controlled housing accommodations' means housing accommodations in any defense-rental area, except that it does not include—

* * * * * * * * *

"(2) any motor court, or any part thereof; any trailer or trailer space, or any part thereof;[1] . . ."

HOUSING AND RENT ACT OF 1949.

Section 202(c).

"The term 'controlled housing accommodations' means housing accommodations in any defense-rental area, except that it does not include—

* * * * * * * * *

"(1) . . . (B) . . . (2) the term 'hotel' means any establishment which on June 30, 1947, was commonly known as a hotel in the community in which it is located and was occupied by an appreciable number of persons who were provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; . . ."

"(2) any motor court, or any part thereof; any trailer or trailer space, used exclusively for transient occupancy."

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[1]Provisions relating to trailers and trailer space inserted upon reenactment of this subsection in 1948. (Housing and Rent Act of 1948, Public Law 464, Chap. 161, 80th Cong., 2d Sess.)

EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED. (50 U. S. C. A. 901, *et seq.*)

Section 302(f).

"The term 'housing accommodations' means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes . . ."

RENT REGULATION FOR CONTROLLED ROOMS IN ROOMING HOUSES AND OTHER ESTABLISHMENTS. 12 F. R. 4302.

Section 1(b)(8)(iv), as amended by Amendment 2, 12 F. R. 5699.

"Every landlord of all such rooms referred to in this paragraph (8), except rooms in motor courts, shall file in the area rent office an application for decontrol of such rooms on a form provided by the Expediter within 60 days after July 1, 1947, or within 30 days after the date of first renting, whichever is the later."

Section 1(b)(2)(i), as amended by Amendment 27, 13 F. R. 1861.

"(2) Decontrolled housing . . . (a) Rooms in a hotel . . . (b) rooms in establishments which were motor courts on June 30, 1947; (c) trailers . . . (d) rooms in any tourist home . . . (e) rooms in other establishments . . .

"Reporting requirements. Every landlord of rooms referred to in (a), (d), and (e) . . . shall . . . file . . . a report of decontrol . . ."

Section 1 (preceding subsection (a).) 12 F. R. 4302.

" 'Motor Court, means an establishment renting rooms, cottages or cabins, supplying parking or storage facilities for motor vehicles in connection with such renting and other services and facilities customarily supplied by such establishments, and commonly known as a motor, auto, or tourist court in the community."